No. 78-1175

In the Supreme Court of the United States

OCTOBER TERM, 1979

HATZLACHH SUPPLY COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (A. 25a-32a) is reported at 579 F.2d 617.

JURISDICTION

The judgment of the Court of Claims was entered on July 14, 1978, and a timely petition for rehearing was denied on September 29, 1978 (Pet. App. 9a). On December 8, 1978, the Chief Justice extended the

time for filing a petition for a writ of certiorari to January 27, 1979 (Pet. App. 10a). The petition was filed on January 26, 1979, and was granted on May 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied bailment contract when goods are lost while held by the United States Customs Service following their seizure for customs violations.

STATUTORY PROVISIONS INVOLVED

1. The Tucker Act, 28 U.S.C. 1491 provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> * * * * *
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law-enforcement officer.

3. Prior to October 3, 1978, 19 U.S.C. (1976 ed.) 1592 provided in relevant part: [1]

> If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the

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[1] 19 U.S.C. 1592 was amended on October 3, 1978, by Section 110(a) of the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888, 893-896. The amended statute provides in part (to be codified at 19 U.S.C. 1592(c)(5)) that:

> If the Secretary has reasonable cause to believe that a person has violated [customs entry requirements as set forth in] subsection (a) and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law.

92 Stat. 896. This amendment was enacted eight years after the declaration of forfeiture in this case and is not directly relevant to this litigation. All citations to the customs laws of the United States in this brief are to the laws as they existed in 1970, at the time of the seizure that occurred in this case.

provisions of section 1485 of this title (relating to declaration on entry) without reasonable cause to believe the truth of such statement, * * * whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; * * * such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates.

4. 19 U.S.C. 1618 provides in relevant part:

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or

mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. * * *

STATEMENT

Petitioner imported certain camera supplies and other miscellaneous items from Germany in April and May of 1970. This merchandise, which had been transported in shipping containers, was seized by the United States Customs Service on its arrival at the port in New Jersey. This action was taken because, upon opening the containers, customs officials discovered discrepancies between the descriptions of the merchandise submitted on arrival and the items in fact landed (A. 26a). The Customs Service gave petitioner formal, written notice that the seized goods were declared forfeited to the United States under 19 U.S.C. 1592.

On June 5, 1970, and June 26, 1970, petitioner applied to the Secretary of Treasury under 19 U.S.C. 1618 for remission of the forfeitures and return of the seized goods (A. 10a, 18a). In these petitions, petitioner offered explanations for the violations of 19 U.S.C. 1592, stating that, while the description of the goods on the customs documents was erroneous, petitioner "in no way contributed, either actively or passively, in the erroneous description, and that his only instruction to [his broker agent] was to prepare a proper [entry] application" (A.

11a; see A. 20a-21a).[2] Petitioner also complained that the government's inventories indicated that a portion of the merchandise had disappeared since the goods were landed (A. 15a-16a, 21a-22a).[3]

On October 13, 1970, the Secretary agreed to remit the forfeiture in return for payment of a $40,000 penalty (A. 3a). Petitioner paid the penalty, and the Customs Service thereupon returned the forfeited materials in its possession (*ibid.*; see A. 26a).

On March 17, 1976, six years after the first container was landed (A. 2a), petitioner filed this suit in the United States Court of Claims seeking to recover $165,220.50, which it alleged to be the value of the goods that were "lost or stolen" while in the custody of the Customs Service (A. 3a).[4] The government moved for summary judgment, alleging that

[2] Petitioner maintained that the misstatements of its agents did not justify forfeiture under 19 U.S.C. 1592 (A. 12a, 20a-21a).

[3] In the June 5, 1970, petition for remission of the forfeiture, petitioner claimed that "the statement of appraisement released to the petitioner's attorneys indicates that the quantities which survived the opening of the container in a public place accessible to strangers on the pier were smaller than the quantities stated on the invoices" (A. 15a). In the June 26, 1970, petition, petitioner asserted that "the importer has sustained an irreparable loss. For the inventory furnished by the Government, even taking several apparent errors into account, shows that a substantial shortage of goods took place after the containers were unsealed on the pier and while in Customs custody" (A. 21a-22a).

[4] Petitioner also sought to recover $2,000,000 for loss of "face and good will" (A. 4a). This claim was denied and is not in issue here.

the complaint failed to state a claim within the court's jurisdiction (A. 26a).[5] The Court of Claims granted the motion, holding that petitioner had not stated a claim for breach of an implied bailment contract and therefore had failed to state a claim on which the court could grant relief (A. 32a).

The court first rejected petitioner's contention that the seizure of the merchandise by the Customs Service was " 'capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored' by law" (A. 26a). The court noted that petitioner's application for remission of the forfeiture "to the Regional Commission of Customs *admitted* that the merchandise description submitted to the [Customs Service] was 'erroneous' and that the discrepancy between the merchandise description and the items actually landed [was] 'obvious and apparent' " (A. 26a; emphasis in original). The court observed that, while the sanction of forfeiture in this context might appear severe, the Customs Service had not acted unlawfully, arbitrarily or capriciously in declaring the forfeiture and seizing the merchandise under 19 U.S.C. 1592 (A. 26a). The court also observed that, even if the seizure of the goods had been unlawful, arbitrary or capricious, the Court of Claims would have had no jurisdiction over petitioner's action because it "would then sound in tort" (A. 26a-27a, citing *Algonac*

[5] The government also impleaded Sea-Land Services as third-party defendant. Sea-Land operated the terminal where the goods were first landed and where they were detained before their removal to a government warehouse.

Mfg. Co. v. *United States*, 428 F.2d 1241 (Ct. Cl. 1976)).[6]

The court then rejected petitioner's claim that the government had entered into an implied contract of bailment to return the merchandise seized for forfeiture under 19 U.S.C. 1592. The court concluded that, when the government seizes merchandise for forfeiture for violations of Section 1592, it does not

> *assent*[] to, or agree[] to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank* v. *United States*, 508 F.2d 817, 205 Ct. Cl. 741 (1974).

(A. 32a; emphasis in original).

The court noted that the Second Circuit had concluded in *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (1958), that an implied-in-fact contract of bailment was created when the government detained merchandise for inspection to determine compliance with entry requirements. It distinguished the decision in *Alliance*, however, on two principal grounds. First, there is "the obvious factual distinction" that this case involves seizure for forfeiture rather than inspection, and the importer in this case

[6] For essentially the same reasons, the court rejected petitioner's claim that the forfeiture of merchandise entered in violation of 19 U.S.C. 1592 constitutes a " 'taking' * * * without just compensation" (A. 27a). Petitioner has not sought further review of these rulings of the Court of Claims.

was thus not the "unquestioned, rightful owner" of the goods as the court had assumed in *Alliance* (A. 30a).[7] Second, where goods are seized for forfeiture under 19 U.S.C. 1592, any tort claim against the United States "arising in respect of * * * the detention" is expressly precluded by 28 U.S.C. 2680(c). Because Congress has "*specifically precluded recovery* in claims arising from customs detention, even where such claims arose from tortious actions by the Government" (A. 31a-32a; emphasis in original), the court reasoned that it could not find an implied agreement by the government to pay for the value of the allegedly missing merchandise (*ibid.*).[8] The court indicated, however, that it would not consider its decision "as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.*, a

[7] In *Alliance*, the court of appeals had relied on the fact that the importer was "the lawful owner" of the merchandise held by the government for customs inspection. 252 F.2d at 532. The court emphasized that the goods there at issue had passed customs inspection before they were lost. *Id.* at 531. The court also remarked that there was an "elaborate set of ten tickets, at least two of which [were] designed to restore the goods to the owner," which supported an inference of a promise to return the goods following inspection. *Id.* at 532.

[8] The court noted that the Second Circuit had ruled in *Alliance* that merchandise lost while in the possession of the government for customs inspection is not being "detained" by the government and that neither tort nor contract liability is thus precluded by 28 U.S.C. 2680(c) for such claims. The court suggested that the *Alliance* court might interpret 28 U.S.C. 2680(c) to preclude recovery on the different facts of this case (A. 31a).

promise, representation or statement that the goods would be guarded or carefully handled" (A. 32a). In the latter circumstances, the court stated that a claim might lie under the Tucker Act even though 28 U.S.C. 2680(c) barred recovery under the Federal Tort Claims Act (*ibid.*).

SUMMARY OF ARGUMENT

The Court of Claims is a court of limited jurisdiction. A claim based upon an implied contract is within the jurisdiction of the Court of Claims only if the contract is one implied-in-fact, not implied-in-law. For petitioner to prevail in this case, it must establish that the United States and petitioner mutually assented in fact to a contract of bailment for merchandise seized by the United States for forfeiture under the customs laws.

A. The elements of an implied-in-fact contractual bailment are wholly lacking in this case. In a contractual bailment, the bailor retains unquestioned title to the property and the right to call for delivery or reclaim his goods. The United States, however, seized petitioner's merchandise by operation of law under a claim of government ownership due to forfeiture for violation of the customs laws, and not by mutual assent. The United States held the merchandise under its own claim of title and not pursuant to any contractual agreement with petitioner.

B. The fact that the United States does not enter into an implied-in-fact contract of bailment when it seizes goods for forfeiture does not mean that the

government has no responsibility under any circumstances to return or safeguard goods seized for violations of the customs laws. At common law, customs officials are regarded as "quasi-bailees" (*Story on Bailments* § 613, at 597 (7th ed. 1863)) because the law imposes on them certain responsibilities that are analogous to those created by a contractual bailment. In particular, customs officers must exercise reasonable diligence in the care of goods seized and held by them in the performance of their official duties. This responsibility is imposed by law, however, and not by agreement; it is enforcable in a private tort action and not in a suit for breach of contract.

The statutes of the United States have long recognized the tort liability of customs officers as a result of their "quasi-bailee" status. 28 U.S.C. 2006 provides that, in an action brought against a customs officer for negligent loss of goods, if it is established that the seizure was made with probable cause the judgment may not be executed against the individual officer but "shall be paid out of the proper appropriation by the Treasury." Under this statute, the liability of customs officers remains grounded in tort, not in contract. The statute merely protects customs officers in limited circumstances from being held personally liable for their tortious conduct. *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1149 (4th Cir. 1974).

The Court of Claims plainly lacks jurisdiction over personal actions against government officers; it also

lacks original jurisdiction over claims grounded in tort. The implied-in-law or "quasi-bailee" responsibilities of customs officers are thus not the proper subject of suit in the Court of Claims. While there is a remedy for goods that are seized but not forfeited and are lost by the negligence of customs officers, that remedy is not in the Court of Claims.

C. This conclusion is supported by the fact that in enacting the Federal Tort Claims Act, Congress was careful not to shoulder for the United States the potential tort liability of customs officers. 28 U.S.C. 2680(c) excludes from the general coverage of the Act any claim arising "in respect of the * * * detention of any goods or merchandise by any officer of customs * * *." Claims for negligent loss of goods during customs detention must be brought against the customs officer as an individual; they are excluded from coverage under the Federal Tort Claims Act. As the Court of Claims concluded in this case, the United States cannot be assumed to have assented in fact to a liability that it has by law disclaimed.

ARGUMENT

THE COURT OF CLAIMS LACKS JURISDICTION TO AWARD DAMAGES ON PETITIONER'S CLAIM BECAUSE AN IMPLIED-IN-FACT CONTRACT OF BAILMENT DOES NOT ARISE FROM THE SEIZURE OF GOODS FOR FORFEITURE UNDER 19 U.S.C. 1592

A. A Claim Founded Upon An Implied Contract With The United States Is Not Within The Jurisdiction Of The Court Of Claims Unless There Was Mutual Assent To Enter Into The Contract

The Court of Claims is a court of limited jurisdiction. Under the Tucker Act, it has jurisdiction to award damages upon any claim against the United States that is

> founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491. The limitations in this grant of jurisdiction are strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Kendall* v. *United States*, 107 U.S. 123, 125 (1882). As this Court stated in *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 587-588 (1941), "[e]xcept as Congress has consented [to a cause of action against the United States], there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States."

In this case, petitioner argues that the United States entered into, and subsequently breached, an implied contract of bailment for merchandise seized by the United States for violations of customs entry requirements under 19 U.S.C. 1592. But a claim based upon an implied contract is within the jurisdiction of the Court of Claims only if the contract is "one implied in fact and not one based merely on equitable considerations and implied in law." *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926). See *Cities Service Gas Co.* v. *United States*, 500 F.2d 448 (Ct. Cl. 1974).

A contract "implied in law" (or quasi-contract) arises "where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress * * *." *Baltimore & Ohio R.R.* v. *United States*, 261 U.S. 592, 597 (1923). The duty "is imposed by operation of law without regard to the intent of the parties. Such arrangements are treated as contracts for the purposes of remedy only." *Russell Corp.* v. *United States*, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073 (1977). See *Algonac Mfg. Co.* v. *United States*, 428 F.2d 1241 (Ct. Cl. 1970).

By contrast, a contract implied-in-fact is a true contract, "founded upon a meeting of [the] minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R.R.* v. *United States*, *supra*, 261 U.S. at 597. An

implied-in-fact contract differs from an express contract only in that the agreement is not expressed in words, either written or spoken, but is instead "indicated by some intelligible conduct, act or sign." *Id.* at 598. In all other respects, all the elements of an express contract must be shown:

> For there to be an express contract, the parties must have intended to be bound and must have expressed their intention in a manner capable of understanding. * * *
>
> * * * * *
>
> A contract implied in fact requires a showing of the same mutual intent to contract as that required for an express contract. The fact that an instrument was not executed is not essential to consummation of the agreement. It is essential, however, that the acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain.

Russell Corp. v. *United States*, *supra*, 537 F.2d at 481-482. Accord, *Tree Farm Development Corp.* v. *United States*, 585 F.2d 493 (Ct. Cl. 1978).

For petitioner to prevail on its claim, it must therefore establish that the United States and petitioner mutually assented to a contract of bailment for merchandise seized by the United States for forfeiture under the customs laws.[9]

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[9] "The general rule that the assent of both parties is necessary before a contract, either express or implied in fact, can come into existence, is applicable to the ordinary case of a contract of bailment." *H. S. Crocker Co.* v. *McFaddin*, 148 Cal. App. 2d 639, 644, 307 P.2d 429, 432-433 (1957). See also pages 22-23, *infra*.

B. Neither The United States Nor Petitioner Manifested Its Assent To A Contract Of Bailment For The Goods Seized For Forfeiture Under 19 U.S.C. 1592

The Court of Claims correctly concluded (A. 32a) that the United States and petitioner did not mutually assent to a contract of bailment for merchandise seized by the United States under 19 U.S.C. 1952 for violations of the customs laws.

1. *The Seizure Of Goods For Violations Of The Customs Laws Does Not Create An Implied-In-Fact Contract Of Bailment*

A contractual bailment cannot be implied in fact "where it appears it was the intention of the parties, as derived from their relationship to each other and from the circumstances of the case, that the property was to be held by the party in possession in some capacity other than as bailee." *H. S. Crocker Co.* v. *McFaddin*, 148 Cal. App. 2d 639, 644, 307 P.2d 429, 433 (1957). When the United States seized petitioner's goods for forfeiture for violations of the customs laws, it did not assent to the elements of a contractual bailment.

A contractual bailment "is premised upon the uninterrupted retention of title in the * * * bailor." *In re American Merchandising Co.*, 136 F. Supp. 952, 954 (D.N.J. 1955); 8 C.J.S. *Bailments* § 1, at 314 (1962).[10] It is created by the delivery of property by

[10] Constructive bailments, which are not contractual in nature but are implied-in-law duties imposed when there is "lawful possession, however created, and the duty to account for the thing as the property of another" (*Spencer* v. *First*

the owner to another for a specific purpose, with an "express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor's directions." *Maulding* v. *United States*, 257 F.2d 56, 60 (9th Cir. 1953). See 9 *Williston on Contracts* § 1030, at 876 (3d ed. 1967). In a contractual bailment, title does not change with delivery of the property, and the owner retains the right to call for delivery or reclaim his goods. *Department of Revenue* v. *Jennison-Wright Corp.*, 393 Ill. 401, 407, 66 N.E.2d 395, 398 (1946); *Haskins* v. *Dern*, 19 Utah 89, 98, 56 P. 953, 955 (1899); *Malz* v. *State*, 36 Tex. Crim. 447, 37 S.W. 748 (1896); 9 *Williston on Contracts*, *supra*, § 1035, at 890-891. While the property remains in the possession of the bailee, the bailee "may not dispute the title of his bailor." *Canadian Co-op. Wheat Producers, Ltd.* v. *Murphy & Hoffman, Inc.*, 52 F.2d 496, 497 (W.D.N.Y. 1931). Because of the trust nature of a contractual bailment, the bailee "cannot set up title in himself unless it has been acquired * * * from a transfer made by the bailor subsequent to the bailment." 9 *Williston on Contracts*, *supra*, § 1036, at 895. *Blackorby* v. *Friend, Crosby & Co.*, 134 Minn. 1, 3, 158 N.W. 708, 709 (1916):

> It is a well-settled rule in the law of bailments that the bailee must return the property or its proceeds to the possession of the bailor before he can assert a title thereto adverse to the bailor.

Carolinas Joint-Stock Land Bank, 165 S.E. 731, 732 (S.C. 1932)), are discussed at pages 22-23, *infra*.

If the bailee transfers or disclaims the title of the bailor, the "bailment terminates and the right to immediate possession is restored to the bailor." *Naamloze Vennootschap Suikerfabriek "Wono-Aseh"* v. *Chase National Bank*, 111 F. Supp. 833, 844 (S.D. N.Y. 1953). See also *Trotter* v. *Union Indemnity Co.*, 33 F.2d 363 (W.D. Wash.), aff'd, 35 F.2d 104 (9th Cir. 1929); *United States* v. *United Marketing Ass'n*, 220 F. Supp. 299, 306 (N.D. Iowa 1963).

These attributes of a contractual bailment relationship bear no resemblance to the situation in this case. When the United States seized petitioner's goods for customs violations under 19 U.S.C. 1952, it did not recognize petitioner as the "unquestioned, rightful owner" (A. 30a) of the goods and undertake to return them at petitioner's direction. The United States seized the merchandise by operation of law under a claim of government ownership due to forfeiture, and not by mutual assent. The United States claimed (and petitioner has not disputed) that the merchandise was brought into this country under a customs declaration that contained material false statements concerning the contents of the shipment (see page 7, *supra*). Because of these false statements, the goods were subject to forfeiture and properly seized by customs officers under 19 U.S.C. 1592. The United States then held the goods under a claim of ownership, not as bailee. Indeed, in view of petitioner's admission "that the merchandise description submitted to [Customs'] officials was 'erroneous' and that the discrepancy between the merchandise description and the items actually landed [was] 'obvious and

apparent'" (A. 26a), it would appear that the government's claim that the goods were forfeited was correct. See *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234 (1972).[11]

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property * * * connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed * * *.

United States v. *Stowell*, 133 U.S. 1, 16-17 (1890).[12]

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[11] In *One Lot Emerald Cut Stones and One Ring, supra*, the Court noted that, in a proceeding to adjudicate goods forfeited for importation in violation of customs entry requirements, the government need not prove intent to defraud. 409 U.S. at 234. See also 19 U.S.C. 1592 (goods may be seized for forfeiture for "any false statement in any [customs entry] declaration * * * without reasonable cause to believe the truth of the statement, whether or not the United States shall or may be deprived of the lawful duties * * *.").

[12] The government's claim of title in this case, though valid, was not adjudicated in formal court proceedings and thus remained unperfected. *United States* v. *Stowell, supra*, 133 U.S. at 17. Adjudication became unnecessary because the Secretary exercised his discretion to remit the forfeiture pursuant to 19 U.S.C. 1618. (See pages 28, 31, *infra*.) During the period that the United States held the goods pursuant to 19 U.S.C. 1592, however, it did so under a claim of rightful ownership and not by the assent of the parties that the goods would be returned at petitioner's direction.

Because the United States seized petitioner's merchandise under a claim or rightful ownership, in derogation of petitioner's title and without assenting to return the merchandise at petitioner's direction, the elements of an implied-in-fact contract of bailment were wholly lacking.[13] The United States held the merchandise under its own claim of title, not pursuant to any contractual agreement with petitioner.[14]

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[13] The decision of the court of appeals in *Alliance Assurance Co.* v. *United States, supra,* is distinguishable on this basis (A. 30a; see note 7, *supra*). In *Alliance,* the court held that the government breached an implied contract of bailment when it failed to return goods that had been lost following their clearance through customs inspection. The court relied on the fact that the importer was "the lawful owner" of the merchandise and noted that the goods had passed customs inspection before they were lost. 252 F.2d at 531, 532. The court also noted that there was an "elaborate set of ten tickets, at least two of which [were] designed to restore the goods to the owner," which supported an inference of a promise to return cleared items following inspection. *Id.* at 532.

Here, by contrast, petitioner's goods did not pass customs inspection. The United States seized the goods for customs violations under claim of right and in derogation of petitioner's claim of title. Moreover, here, unlike in *Alliance,* there were no "additional facts from which an implied or express agreement could possibly arise, *e.g.*, a promise, representation, or statement" that the goods would be returned at petitioner's request (A. 32a). The Court need not decide in this case whether the decision in *Alliance,* on its different facts, was correct in finding an implied-in-fact contract. The Court of Claims properly refused to decide that hypothetical question (A. 30a, 32a).

[14] Petitioner cites (Br. 14-15) several cases in which courts have determined that, under the particular facts presented, the United States did assent to an implied-in-fact contract of bailment. These cases are inapposite, however, because we do not contend that the United States *cannot* assent to an implied-in-fact contract of bailment—as when it charters a barge (*C. F. Harms Co.* v. *Erie R.R.*, 167 F.2d 562 (2d Cir. 1948) or allows members of the public to use a Navy dock (*Gulf Transit Co.* v. *United States*, 43 Ct. Cl. 183 (1903)). Rather, it is our position that, on the totally different facts of this case, the United States *did not* assent to an implied-in-fact contract of bailment.

Petitioner's reliance (Br. 16 n.11) on *United States* v. *Dickinson*, 331 U.S. 745 (1947), and *United States* v. *Lynah*, 188 U.S. 445 (1903), is similarly misplaced. In those cases, the Court suggested, without concluding, that a taking of land for public use may create an implied promise to pay just compensation. The Court held that such a claim is, in any event, within the jurisdiction of the Court of Claims over claims "founded * * * upon the Constitution" (28 U.S.C. 1491) because the claim "traces back to the prohibition of the Fifth Amendment" * * *." 331 U.S. at 748. There is plainly no implied-in-fact promise of compensation when goods are seized for forfeiture for violations of the customs laws. The goods are not appropriated for public use; they are forfeited for unlawful conduct. *United States* v. *Stowell, supra.*

Finally, petitioner's reliance (Br. 15) on cases in which a statute creates a duty in an officer to pay certain sums to a claimant is unavailing. Where a statute "leave[s] no question" that a sum of money is to be paid, the claim is properly founded on the statute, not on an implied-in-fact contract to which the officer has not assented. See, *e.g., United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899); *Mosca* v. *United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969). Petitioner has never claimed that it has a right in money damages against the United States based on statute. Moreover, there is no statutory duty to return goods that are forfeited to the United States.

2. *Neither 28 U.S.C. 2465 Nor A Discretionary Remission Of The Forfeiture Under 19 U.S.C. 1618 Creates An Implied-In-Fact Contract Of Bailment*

a. The fact that the United States did not enter into an implied-in-fact contract of bailment does not

mean that government officers have no responsibility under any circumstances to return goods seized for violations of the customs laws. It has been said that customs officials are "quasi bailees" (*Story on Bailments* § 613, at 597 (7th ed. 1863)) because the law imposes on them certain responsibilities that are analogous to those created by a contractual bailment. But these responsibilities are imposed by law, not by contractual agreement. There is no jurisdiction in the Court of Claims to award damages for the breach of these non-contractual responsibilities. *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).

While many cases "refer to a bailment as a contractual relation, the statement is not entirely accurate. The relation may be created by operation of law." *Seaboard Sand & Gravel Corp.* v. *Moran Towing Corp.*, 154 F.2d 399, 402 (2d Cir. 1946) (footnote omitted). Courts have long recognized the distinction between contractual bailments, which "spring[] from the mutual assent of the parties" (*State* v. *Carr*, 118 N. J. L. 233, 234, 192 A. 36, 37 (1937)), and quasi-bailments or constructive bailments that arise by operation of law rather than agreement.

> While it is a relationship that ordinarily rests in contract, express or implied in fact, there is also a class of bailments, *quasi*-contractual in nature, which arises by operation of law "where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he ought, under principles of justice, to keep it safely and restore it or deliver it to the owner * * *; * * * such *quasi* contracts of bailment include what are known as constructive and involuntary bailments."

Ibid. Accord, *Seaboard Sand & Gravel Corp.* v. *Moran Towing Corp.*, *supra*, 154 F.2d at 402; *Wilson* v. *Citizens Central Bank*, 56 Ohio App. 478, 480, 11 N.E.2d 118, 119 (1936); *Spencer* v. *First Carolinas Joint-Stock Land Bank*, *supra*, 165 S.E. at 732; *Armstrong* v. *Sisti*, 242 N.Y. 440, 444, 152 N.E. 254, 256 (1926); 8 Am. Jur. 2d *Bailment* § 52 (1963).[15]

At common law, collectors of customs were regarded as "quasi-bailees" of merchandise seized for customs violations.[16] See *Story on Bailments*, *supra*, §§ 613, 618, at 597, 599. The responsibilities of the collector were imposed by law, not by agreement. If

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[15] In *Continental Insurance Co.* v. *Harrison County*, 153 F.2d 671 (5th Cir. 1946), Judge Walker noted that a constructive or quasi-bailment may be implied by law even when no mutual assent exists and that it ordinarily results from " 'lawful possession, however created, and [the] duty to account for the thing as the property of another.' " *Id.* at 676, *quoting Burns* v. *State*, 145 Wis. 373, 380, 128 N.W. 987, 990 (1911).

See also 8 C.J.S. *Bail* § 15, at 362 (1962) ("* * * an actual contract or one implied in fact is not always necessary to create a bailment. There is also a class of bailments which arise by operation of law.").

[16] Collectors, as agents of the government, are true bailees for the government of goods seized or held under a claim of government title. The government, being the owner, has the right to demand that the collector relinquish possession of the goods at the government's direction. *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337 (1872), on which petitioner relies (Br. 8), established no more than this. In *Thomas* the Court held that the collector, "as custodian of the money [collected,] * * * is bailee of the government." *Id.* at 352. See also 19 U.S.C. 1605, which directs the collector to retain forfeited goods in his possession.

the goods were properly seized by the collector and forfeited to the government, there was of course no duty to return the goods to the claimant. If, however, the goods were determined not to be forfeited, the customs officers could be "liable in their individual capacities for tortious conduct committed in the performance of their duties." *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1149 (4th Cir. 1974). The tort liability of the officers as constructive or quasi-bailees only "bears some analogy" (*Story on Bailments, supra*, § 613, at 597)[17] to the responsibilities that would be imposed if a contractual bailment had been created. If the seizure was "tortious, and without any reasonable cause" (*ibid.*), the customs officer could be sued in tort for conversion or trespass and would be strictly liable for goods lost while in his possession. *Id.* at 599. If, on the other hand, the seizure was justifiable (although eventually proven to be in error), the officer was liable only on a theory of negligence for breach of his "official obligation, as imposed by law" to exercise "reasonable diligence" in the performance of the duties of his office. *United States* v. *Thomas*, 82 U.S. (15 Wall.) 337, 342-343 (1872). The officer would then be liable in tort "only for losses and damages occasioned by the want of ordinary diligence." *Story on Bailments, supra*, § 613, at 597. See *Agnew* v. *Haymes*, 141 F. 631, 641 (4th Cir. 1905).

[17] See also 9 *Williston on Contracts, supra*, § 1038A, at 905: "While not directly presenting a question of contracts, there is a close analogy."

The legal duty imposed on the collector under the common law is plainly not created by agreement or mutual assent; the duty attaches even if the collector attempts to disclaim it at seizure. Failure to act with due diligence establishes a personal liability in tort; the duty is not assumed by contract or mutual assent. See *States Marine Lines, Inc.* v. *Shultz, supra*, 498 F.2d at 1149.[18]

The quasi-bailee status of the collector, which is implied by law "to supply the place of a special agreement where there is none" (*United States* v. *Thomas, supra*, 82 U.S. (15 Wall.) at 349)), has long been recognized in the statutes of the United States. Goods seized by customs officers for violations of entry requirements under 19 U.S.C. 1592 may be made the subject of forfeiture proceedings in the United States district courts. See 28 U.S.C. 2461. If the goods are adjudicated to be forfeited to the United States, the government's title is "perfected" (*United States* v. *Stowell, supra*, 133 U.S. at 17) and the claimant obviously has no further right or claim in the goods. If, however, judgment is entered for the claimant in

[18] The cases on which petitioner relies (Br. 8-10) establish only that the collector may be held personally liable in tort for negligence in the conduct of his office. See, *e.g.*, *Averill* v. *Smith*, 84 U.S. (17 Wall.) 82 (1872); *Burke* v. *Trevitt*, 4 F. Cas. (No. 2,163) 746 (C.C. Mass. 1816); *Agnew* v. *Haymes*, 141 F. 631 (4th Cir. 1905). See also *The Conqueror*, 166 U.S. 110 (1897); *Dioguardi* v. *Durning*, 139 F.2d 274 (2d Cir. 1944). By referring to the law of bailments as a source of a standard of due care, these decisions do not hold that the collector has in fact agreed or assented to a contractual bailment.

the forfeiture proceeding, 28 U.S.C. 2465 provides that the goods held subject to forfeiture "shall be returned forthwith to the claimant or his agent * * *." The customs officer must then return the goods, and if he fails to do so, the claimant may bring suit against the collector for personal liability in tort to recover his loss. *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1148-1151.[19] In the action against the collector, if it is determined that the seizure was made without probable cause, the officer will be strictly liable for the loss of goods in his possession, and the United States will not indemnify the officer. *Agnew* v. *Haymes, supra,* 141 F. at 637-641.[20] If, however, there was probable cause for the seizure, the officer will be liable only in

[19] The United States has not consented to suits for money damages for the loss of goods that are not returned by the collector following an adjudication of non-forfeiture. The duty to return the goods resides in the collector, who may be sued individually and may be indemnified, in some circumstances, by the United States (see 28 U.S.C. 2006). *The Conqueror,* 166 U.S. 110 (1897); *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1148-1151; *Agnew* v. *Haymes, supra,* 141 F. at 636-641. Congress has preserved the common law defenses that are available to the collector in the individual tort action. Indeed, as we discuss at pages 33-40, below, it was the adequacy of the common-law remedy against the collector that led Congress to enact 28 U.S.C. 2680(c) to exclude claims based on customs detentions from the general waiver of sovereign immunity for tort claims under the Federal Tort Claims Act.

[20] Indeed, if the seizure was without probable cause, the collector may be personally liable for consequential damages that otherwise are forbidden by 28 U.S.C. 2465. See *Agnew* v. *Haymes, supra,* 141 F. at 641.

negligence for the value of goods lost or damaged while in his possession; moreover, the judgment entered against the collector in such a case may not be executed against the collector, but "shall be paid out of the proper appropriation by the Treasury." 28 U.S.C. 2006.[21] See *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149-1150.

Under these statutes, the liability of the officer remains grounded in tort, not in contract. The statutes merely "protect[] * * * such officers" in some circumstances from their tort liability. *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149. The tort liability of the officer must be established, and the claim reduced to judgment, before the United States will act as surety for the collector's negligence. 28 U.S.C. 2006. And even then the United States has not consented to pay the judgment if the seizure was made without probable cause. *Ibid.* The Court of Claims plainly lacks jurisdiction over personal actions against government officers and individuals;

[21] 28 U.S.C. 2006 provides:

> Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:
>
> (1) probable cause existed; or
>
> (2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.
>
> When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

it also lacks original jurisdiction over claims grounded in tort. The implied-in-law or "quasi-bailee" responsibilities of the collector are thus not the proper subject of suit in the Court of Claims.

Petitioner, in any event, has not sought to invoke the traditional tort remedy against the collector for negligent loss of goods. Whether such a remedy would have been available to petitioner had it been sought in the circumstances of this case is far from clear.[22] But, whatever the tort liability of the collector might have been as "quasi-bailee" of the goods seized for forfeiture, the defect with petitioner's action in the Court of Claims is that it seeks recovery against the United States on a bailment that is implied in law, not in fact.

b. Petitioner argues (Br. 12) that, when the Secretary of the Treasury exercised his discretion under 19 U.S.C. 1618 to remit the forfeiture upon petitioner's payment of a $40,000 penalty, the government thereby assented to an implied-in-fact contract of bailment for the merchandise that had been seized. But the discretionary action taken by the Secretary to remit the forfeiture was taken approxi-

[22] If, as we believe (see pages 18-19, *supra*), the goods were seized under a valid claim of forfeiture, petitioner would not be entitled to return of the goods in a proceeding to adjudicate the forfeiture. The Secretary of the Treasury could, however, remit the forfeiture "upon such terms and conditions as he deems reasonable and just." 19 U.S.C. 1618. Petitioner's right to the goods would then be no greater than that granted by the Secretary in remission of the forfeiture. See pages 28-31, *infra*.

mately six months after the goods had been seized for customs violations.[23] During the preceeding six month period, the merchandise had been held by the United States under a claim of right and not as an implied-in-fact bailee. The Secretary's action in remitting the forfeiture did not disclaim the government's prior declaration that the goods were forfeited. To the contrary, by remitting the forfeiture "upon such terms and conditions as he deems reasonable and just" (19 U.S.C. 1618), the Secretary reaffirmed that the goods were forfeited but concluded that a lesser sanction was appropriate due to the absence of "willful negligence," an intent "to defraud the revenue," or the presence of other "mitigating circumstances" (*ibid.*). This action did not retroactively create a contractual bailment at the time the goods were seized. See pages 16-18 *supra*.

Petitioner further contends that "the Customs Service explicitly agreed to return the goods upon payment of a $40,000 penalty" (Br. 12). But what the Secretary necessarily undertook was to return the goods *then in his possession*, not the additional merchandise that petitioner long previously had claimed was missing.[24] It is obvious that the Secretary could

[23] The forfeiture was remitted in October 1970. The goods were seized in April and May 1970. See pages 5-6, *supra*.

[24] Petitioner informed the Secretary in June 1970—two months after the seizure and four months before the Secretary remitted the forfeiture—that merchandise allegedly in the shipment was not reflected in the Customs Service inventory. See page 6, note 3, *supra*.

not implicitly have undertaken to return goods that had long been alleged to be missing and were not then in his possession. And petitioner has not alleged that the Secretary entered into an express contract to make petitioner whole for the claimed losses of over $165,000 (A. 24a) in return for petitioner's payment of the $40,000 penalty.[25] Obviously, the Secretary undertook to deliver something to petitioner in remitting the forfeiture. But, in the absence of any express agreement to the contrary, it cannot be implied that he undertook to perform a physical impossibility by returning goods petitioner repeatedly had asserted to be missing from the government's inventory (A. 15a-16a, 21a-22a).

Moreover, petitioner has never contended that the Secretary breached a contract to return the mer-

[25] Indeed, it is questionable whether the Secretary would have authority to enter into such a contract. 28 U.S.C. 2006 contemplates that the United States will not be liable for goods lost or damaged by customs collectors unless (i) the seizure was with probable cause but the goods are adjudicated not forfeited *and* (ii) the goods were lost through the tortious misconduct of the collector. See pages 25-27, *supra*. The Secretary's authority to remit a forfeiture upon such terms as he finds just and reasonable (19 U.S.C. 1618) would seem subjected to the express limitations on governmental liability for the collector's actions in 28 U.S.C. 2006.

But this issue is not presented here in any event. Respondent did not plead the existence of an express agreement to that effect or attach a copy of any such agreement to its petition in the Court of Claims. This is fatal to its present claim (Br. 12) that an express contract existed and imposed a duty on the Secretary to return goods that were not in his possession. See Rule 35(d) of the Rules of the Court of Claims; *Bateson-Stolte, Inc.* v. *United States*, 142 Ct. Cl. 304 (1958).

chandise the government held at the time that the forfeiture was remitted.[26] Instead, in the Court of Claims and in his statement of the question presented in this Court, petitioner has asserted that the United States breached "an implied-in-fact-contract of bailment" (Pet. Br. 12) that arose at the time that the goods were *seized* for customs violations. In any event, any claim raised here that the Secretary breached a contract to return goods in his possession at the time that the forfeiture was *remitted* would not be within the scope of the question on which certiorari was granted and should not be considered by this Court. Rule 23(1)(c) of the Rules of this Court; *Beck* v. *Washington*, 369 U.S. 541, 554 (1962). See also note 25, *supra*.

c. The question faced by this Court, whether petitioner's claims are based on an implied-in-fact contract or in tort, is a problem not often confronted in modern litigation. With the abandonment of the strict rules of common law pleading, such distinctions have lost most of their importance. See Fed. R. Civ. P. 2. When a suit is brought against the United States in the Court of Claims, however, these distinctions remain critical: the Court of Claims has jurisdiction over contract claims against the United States only if the "contract" arises from the mutual assent of

[26] Thus, petitioner has not contended that goods shown on the customs inventory were not returned when the forfeiture was remitted. See notes 3, 25, *supra*. Instead, petitioner argued in the Court of Claims (A. 34a) and reasserts here (Br. 12) that the remittance retroactively implied a bailment from the time of seizure. This contention is in error for the reasons previously discussed (pages 28-30, *supra*).

the parties, and it does not have jurisdiction over tort claims against either the United States or government officers.[27] While there is a remedy available for owners of goods that are seized but not forfeited and are lost while in the custody of customs officials, that remedy is not in the Court of Claims.[28]

3. *The Exception From Governmental Tort Liability in 28 U.S.C. 2680(c) For Claims Arising From The Detention Of Goods By Customs Officers Supports The Conclusion That An Implied-In-Fact Contract Of Bailment Does Not Arise From The Seizure Of Goods For Violations Of The Customs Laws*

a. As we have shown, the common law has long recognized a tort action against the collector for the

[27] In *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 395 (1939), the Court reiterated that a tort claim may not be the subject of relief in the Court of Claims. See also *Bigby* v. *United States*, 188 U.S. 400 (1903). There must be a *contractual* undertaking, either express (as in *Keifer & Keifer* and *Burtt* v. *United States*, 176 Ct. Cl. 310 (1966)) or implied-in-fact (as in *Somali Development Bank* v. *United States*, 508 F.2d 817 (1974)) to sustain the action in the Court of Claims.

28 U.S.C. 1504 gives the Court of Claims *appellate* jurisdiction over final judgments in the district courts in civil actions based on tort claims against the United States under 28 U.S.C. 1346(b), but only with the consent of all parties. See *Bird & Sons, Inc.* v. *United States*, 420 F.2d 1051, 1053 & n.3 (Ct. Cl. 1970). Petitioner sought to invoke the original jurisdiction of the Court of Claims, so Section 1504 is inapplicable here.

[28] Petitioner is plainly mistaken in contending that a contract should be implied else "there would be little or no incentive for government officials to maintain seized goods in proper storage facilities" (Br. 36). The collector's common law tort responsibility ensures that he acts under a duty of due diligence.

negligent loss of goods held in his possession.[29] In enacting the Federal Tort Claims Act to authorize claims against the United States for injury caused by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant" (28 U.S.C. 1346(b); see 28 U.S.C. 2674), Congress did not choose to shift to the United States the potential tort liability of the collector. Instead, Congress determined to continue the arrangement developed at common law and under 28 U.S.C. 2006 and 2465, by which the United States will pay the judgment entered against the collector in a private tort action for negligence only when the seizure was supported by probable cause. See pages 25-27, *supra*. Because of the adequacy of the remedy afforded by the private tort action and 28 U.S.C. 2006, and because of Congress' unwillingness to assume any broader liability, 28 U.S.C. 2680(c) excludes from the general coverage of the Federal Tort Claims Act

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

[29] The action may be brought by the claimant if the goods are determined to be his property. The action may be brought by the United States if the goods are forfeited to the United States. See *United States* v. *Thomas*, *supra*; note 15, *supra*.

Petitioner's claim of negligent loss of goods is one "arising in respect of the assessment or collection of any * * * customs duty, or the detention of * * * goods or merchandise by [an] officer of customs." It is therefore not within the limited waiver of sovereign immunity for tort claims against the United States in the Tort Claims Act. Assuming, for purposes of argument, that a tort claim may exist in the factual context of this case, it must be filed against the collector individually, not against the United States.[30] *States Marine Lines, Inc.* v. *Shultz, supra*, 498 F.2d at 1148-1151.

b. Petitioner argues, however, that the exception from direct government tort liability in 28 U.S.C. 2680(c) applies only to claims based on the fact of detention itself and that the statute does not exclude tort claims for the negligent loss of goods "after they have been detained" (Br. 18).[31] The language of

[30] Of course, even if we were wrong in this submission, petitioner could not prevail in this case. The Tort Claims Act confers no original jurisdiction on the Court of Claims. 28 U.S.C. 1346(b). Moreover, even if this case had arisen in a federal district court, petitioner could not succeed in any action under the Federal Tort Claims Act because the two-year statute of limitations on tort claims against the United States (28 U.S.C. 2401(b)) expired long before petitioner initiated this litigation. See page 6, *supra*.

[31] Petitioner's assertion is supported by *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (9th Cir. 1978), and *Alliance Assurance Co.* v. *United States, supra*. It has been rejected by several courts, including the Court of Claims in this case (A. 31a). See, *e.g.*, *United States* v. *One (1) 1972 Wood, 19 Ft. Custom Boat FL 8443AY*, 501 F.2d 1327 (5th Cir. 1974); *S. Schonfeld Co.* v. *SS Akra Tenaron*, 363 F. Supp. 1220 (D. S.C. 1973); *States Marine Lines, Inc.* v. *United States*, 359 F. Supp. 512 (D. S.C. 1973), rev'd on other grounds, 498 F.2d 1146 (4th Cir. 1974). The conflict is not, however, presented in this case for, as we have noted above (note 30, *supra*), the Court of Claims has no original jurisdiction over claims arising under the Federal Tort Claims Act.

the statute does not support such a distinction: it excludes "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs * * *." 28 U.S.C. 2680(c). A claim alleging that goods were lost while being detained is literally a claim that "aris[es] in respect * * * of the detention." *Ibid.* Petitioner cannot maintain, on the one hand, that goods were lost while being detained by the Customs Service, and argue, on the other hand, that the goods were lost "after" the detention so as to be beyond the scope of 28 U.S.C. 2680(c).

The legislative history of the Federal Tort Claims Act refutes petitioner's effort "to fracture the clear language of [the] statute." *Andrus* v. *Sierra Club*, No. 78-625 (June 11, 1979), slip op. 8. Since its initial enactment, the Federal Tort Claims Act has included a series of exceptions from tort liability for various federal activities. The exception for claims arising in respect of the detention of goods by customs officers is one of the 13 exceptions now contained in 28 U.S.C. 2680(a)-(m). When these exceptions were first considered by Congress in 1940, Judge Alexander Holtzoff, who was then an officer of the Justice Department, testified before a congressional subcommittee that the exception for claims "arising in respect of the assessment or collection of any tax or customs

duty or the detention of any goods or merchandise by any officer of customs" should be enacted because various statutory remedies already existed and "[t]here was no purpose in interfering with that machinery." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. on the Judiciary of the Senate Judiciary Committee*, 76th Cong., 3d Sess. 38 (1940). Two years later, the bill was again submitted to Congress, and the list of exceptions contained in 28 U.S.C. 2680 was supported by the Justice Department generally—without reference to particular exceptions—on the grounds that the exceptions either were necessary to protect certain government activities from the threat of suit or because other adequate remedies already were in existence.[32] *Tort*

[32] Petitioner, relying on *Alliance Assurance Co.* v. *United States, supra*, 252 F.2d at 534, argues (Br. 27) that the exclusion in 28 U.S.C. 2680(c) for Customs Service activities is narrower than the exception for Postal Service activities, which applies to claims of "loss, miscarriage, or negligent transmission" of mail. 28 U.S.C. 2680(b). To the contrary, the Postal Service exception in 28 U.S.C. 2680(b) applies to only a small subset of the broader activities excepted from tort liability for customs officers in 28 U.S.C. 2680(c). While the Postal Service exception applies only to claims arising from the loss or negligent transmission of mail, the Customs Service exception applies broadly to "[a]ny claim" whatsoever "arising in respect" to the detention of goods by customs officers. While the specific language of the Postal Service exception supports an inference that claims *not* based on loss or negligent transmission of mail are *not* excluded from Tort Claims Act coverage, the specificity of 28 U.S.C. 2680(b) provides no basis for limiting the broader exemption contained in 28 U.S.C. 2680(c).

Petitioner also cites (Br. 24-26) numerous law review articles that discuss the legislative history of the Federal Tort

Claims: Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary of the House Comm., 77th Cong., 2d Sess. 28, 44 (1942). When the Federal Tort Claims Act was eventually enacted in 1946, Congress adopted the exceptions the Justice Department had proposed, explaining that the exceptions exclude from the coverage of the Act "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945).

Petitioner argues that this legislative history indicates that claims based on negligent loss of goods during customs detention were not contained within the exception in 28 U.S.C. 2680(c) because no "adequate remedies [were] already available" for such claims. But petitioner is simply mistaken in its premise that there were no pre-existing "statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers" (Pet. Br. 23). As we have explained in detail (pages 25-27, *supra*), the claimant's traditional remedy—long recognized by the statutes of the United States—is to sue the collector individually in tort for the loss or damage and then to execute on the judgment by obtaining payment from the Treas-

Claims Act. These articles support our position that the exception contained in 28 U.S.C. 2680(c) was enacted because other adequate remedies existed for the loss of goods during customs detention.

ury. 28 U.S.C. 2006. See *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149. To be sure, the United States will not shoulder a judgment against the collector if the seizure was without probable cause; and, if the seizure was with probable cause, the collector (and, thereafter, the government) will be liable only for negligent loss of the goods and not for consequential damages.[33] 28 U.S.C. 2006. It was, no doubt, as Judge Holtzoff testified, the need to avoid interference with the traditional strictures of this adequate pre-existing remedy that led Congress to exclude from general governmental tort liability all claims arising from the detention of goods by the collector.[34] By enacting 28 U.S.C. 2680(c), Congress was careful not to assume a liability greater than that the United States had assumed under pre-existing legislation.

The legislative history of the Federal Tort Claims Act thus supports the conclusion that 28 U.S.C. 2680(c) is as broad as the words Congress employed. Claims for negligent loss of goods during customs de-

[33] See 28 U.S.C. 2465; *The Conqueror, supra,* 166 U.S. at 121-125; *Story on Bailments, supra,* at 598-599.

[34] If 28 U.S.C. 2680(c) means only what petitioner urges, the traditional limitations on the liability assumed by the United States under 28 U.S.C. 2006 would be rendered meaningless. As the court concluded in *States Marine Lines, Inc.* v. *Shultz, supra,* 498 F.2d at 1149, the exception from Federal Tort Claims Act liability in 28 U.S.C. 2680(c) "merely recognized the established procedure and the long-standing protections afforded by 28 U.S.C. §§ 2006 and 2465." 28 U.S.C. 2680(c) should not be read to "drain 28 U.S.C. §§ 2006 and 2465 of any purpose." 498 F.2d at 1150.

tention must be brought against the collector as an individual. They are excluded from coverage under the Federal Tort Claims Act.

c. Congress' careful efforts to preserve the traditional restrictions on the common law tort remedy against the Collector in enacting the Federal Tort Claims Act supports our submission that an implied-in-fact contract of bailment does not arise when goods are seized for forfeiture under 19 U.S.C. 1592. The exclusion in the Federal Tort Claims Act for claims arising in respect of customs detention is not an accidental result of drafting. Rather, it reflects a considered judgment by Congress that the sovereign immunity of the United States with respect to such claims should not be waived beyond the limited, adequate remedy available under the common law and 28 U.S.C. 2006. As the Court of Claims stated, allowing recovery against the United States on an implied-in-fact contract theory for breach of the "quasi-bailee" tort responsibility of the collector would " 'admit at the back door that which has been legislatively turned away at the front door' " (A. 31a, quoting *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977)).[35] The United States cannot be assumed to have assented in fact to a lia-

[35] Petitioner mischaracterizes *Stencel* by arguing that it involved an attempt to "bypass the procedures" for relief provided by statute. In *Stencel,* the Court refused to infer a contractual undertaking by the government to indemnify a party for losses that the government had, by statute, otherwise limited or disclaimed. See 431 U.S. at 672-674. The Court's reasoning in *Stencel* applies here as well.

bility that it has in fact disclaimed by statute. See *Jackson* v. *United States*, 573 F.2d 1189 (Ct. Cl. 1978). The "quasi-bailee" status of the collector is a responsibility imposed by law, not a contract implied-in-fact. The Court of Claims therefore lacked jurisdiction in this case.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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